

STATE OF MICHIGAN  
COURT OF APPEALS

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WARD E. DEUTSCHER, JR. and JUDY  
BEDELL DEUTSCHER,

UNPUBLISHED  
January 25, 2005

Plaintiffs/Counterdefendants-  
Appellants,

v

ANDREW K. BEUTER and ROBIN A. BEUTER,

No. 251903  
Calhoun Circuit Court  
LC No. 02-000784-CH

Defendants/Counterplaintiffs-  
Appellees.

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Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

This property dispute involves a disputed triangular parcel of land abutting Barron Lake in Cass County between the parties' two residences. Plaintiffs claim the land by adverse possession. Defendants say they are the owners of the disputed land and allege counts of trespass, malicious destruction of property, and nuisance. After a bench trial, the trial court issued its written opinion, in which it (1) ruled that the disputed land belonged to defendants and (2) awarded defendants \$250 in damages for malicious destruction of property. Plaintiffs appeal, and we affirm.

I. ADVERSE POSSESSION

Plaintiffs contend that the trial court erred when it ruled that plaintiffs had failed to prove the element of hostility in its adverse possession claim. Adverse possession claims are subject to the stringent standard of clear and cogent evidence. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2000). To establish adverse possession, the claimant must show that his possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years. MCL 600.5801; *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212, 215 (1995) (citation omitted). Mutual use or occupation of property with the owner's permission is insufficient to establish adverse possession. *Id.* (citation omitted).

With respect to adverse possession, "hostility" is a term of art. Hostility as it relates to adverse possession refers not to ill will between the parties but rather, use of property by a claimant that is inconsistent with the right of the true owner, without permission asked or given,

and use that would entitle the owner to a cause of action against the intruder. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). The trial court found that, at best, the hostility necessary to sustain plaintiffs' claim did not arise until 2001. We conclude that the record supports the trial court's finding. Plaintiffs did not hire a surveyor and place stakes until the fall of 2001. Plaintiffs' hostile acts of moving defendants' boat rack, roto tilling the disputed land, putting up a rope fence, and cutting down the trees did not happen until 2001 or later. All but the first happened within a three-week span in the spring of 2002. The relevant testimony concerned maintenance and especially mowing of the disputed land, which was a grassy beach. Both sides and their predecessors in interest maintained the land concurrently. For example, a friend and neighbor who mowed the grass as a courtesy for plaintiffs' predecessor in interest, conceded that defendants' predecessor in interest also mowed the disputed area. The court also heard un rebutted testimony that, to be neighborly, one of the plaintiffs mowed defendants' whole lawn including the disputed area.

Because plaintiffs failed to prove the elements of adverse possession by clear and cogent evidence, we hold that the trial court did not err when it ruled in favor of plaintiffs.

## II. RES JUDICATA

Plaintiffs also argue that the trial court erred in concluding that a 1965 judgment had a preclusive effect on plaintiffs' current suit.<sup>1</sup> The 1965 judgment addressed the same boundary disputed here. The trial court correctly construed that judgment. By its very terms, the 1965 complaint sought to quiet title, establish boundaries, and "correct . . . uncertainties." Before the judgment, a roving low water mark was used to describe the land neighboring that of the present parties. This variability led to uncertainties. The court in the 1965 case accordingly set a 215-foot boundary line and a marker was placed at that line. Thereafter, defendants' chain of title, unlike plaintiffs', relied on the judgment's 215-foot line.

Plaintiffs further contend that the language in the 1965 judgment referring to the most westerly corner is reference to a monument, which should prevail over the course and distance of 215 feet. It is long settled that monuments control courses and distances, and when monuments and measurements vary, the monuments always control. *Woodbury v Venia*, 114 Mich 251, 257; 72 NW 189 (1897). Plaintiffs' argument fails for a number of reasons. First, the monuments must be from original surveys. *Id.* Plaintiffs did not demonstrate that the western corner is from an original survey. Much of the ambiguity of the chains of titles on both sides stemmed from reference in subsequent documents to original surveys that were no longer available.

Furthermore, a corner in a survey, without some physical characteristic distinguishing it, is not a monument. "A monument when used in describing land has been defined as any physical object on the ground which helps establish the location of the line called for, and the

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<sup>1</sup> Defendants' argument that the issue is improperly before the Court because plaintiffs changed their position on the preclusive effect of the judgment, is not persuasive. Plaintiffs have not changed their position at all. They concede that the 1965 judgment controls, but challenge the substance and interpretation of the judgment. The issue is therefore preserved for appeal.

term ‘monument’ when used with reference to boundaries indicates a permanent object which may be either a natural or an artificial one.” *Murray v Buikema*, 54 Mich App 382, 387; 221 NW2d 193 (1974). The corner is a point on a survey used to represent a legal boundary, not a physical characteristic of the land itself. Therefore, it is not a monument.

Indeed, no monument could be found where plaintiffs alleged the marker to be located. While erosion or human intervention may have removed it, the court was free to infer that the absence of a marker meant that the boundary line ended at the 215-foot mark, where a marker was found. “When [monuments] cannot be found, or if lost or obliterated, they must be restored upon the best evidence obtainable which tends to prove where they originally were. For this purpose surveys are made and the lines retraced as near as possible.” *Hess v Meyer*, 73 Mich 259, 263; 41 NW 422 (1889). The trial court’s choice between the two expert surveys is not clearly erroneous. The experts agreed that the descriptions upon which they relied had different starting points, were ambiguous, and inevitably led to overlaps or gaps. Neither testified that the other expert opinion was unreasonable. The trial court was presented with a difference of opinion in light of the 1965 judgment, and therefore had to weigh the evidence and decide how much weight to place on the testimony of the parties’ experts.

Accordingly, we hold that the trial court did not err when it interpreted the language of the 1965 judgment in favor of defendants.<sup>2</sup>

### III. DAMAGES TO DEFENDANTS

Plaintiffs assert that the trial court erred when it awarded defendants \$250 for damage done by plaintiffs to the disputed land. Defendants listed their damages, which, without legal fees, exceeded \$2,000, and offered the lay opinion testimony of defendant Andrew Beuter to support their claim. Plaintiffs did not dispute or otherwise rebut the testimony.

Lay opinion testimony is admissible if it is rationally based on the perception of the witness and helpful to determination of a fact in issue. MRE 701. The amount of defendants’ damages was at issue. The challenged testimony helped to set that amount. It was based on defendant’s perception of the felled trees and the roto-tilled soil, as well as his knowledge of what was spent on the sod and trees. An owner is qualified to testify about the value of his property. *Akyan v Automobile Club Ins Ass’n*, 207 Mich App 92; 523 NW2d 838, aff’d in part, rev’d in part, remanded on other grounds 208 Mich App 271; 527 NW2d 63 (1994). Therefore, we hold that the trial court did not err.

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<sup>2</sup> Plaintiffs claim that the trial court granted more relief than defendants requested. In granting equitable relief, a court is not bound by the prayer for relief but may fashion a remedy as warranted by the circumstances. *Three Lakes Ass’n v Kessler*, 91 Mich App 371, 377-378; 285 NW2d 300, 303 (1979) (citing *Pierce v Riley (Supplemental Opinion)*, 51 Mich App 504, 507-508; 215 NW2d 759 (1974)). Acquiescence is simply a way for a court to quiet title. The court decided the rights of the parties to the disputed land, which is precisely what both parties asked it to do.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Richard A. Bandstra